

1 orders.

2 What I would also do, likewise, is in
3 Exhibit 1, which is the addendum to an appraisal
4 report dated April 7th, that, your Honor, was
5 admitted into evidence at the April 14th hearing
6 after an extensive proffer that no one objected to,
7 no one objected at the valuation hearing and it was
8 admitted into evidence, I would like that to be in
9 evidence for purposes of this hearing today also,
10 which Mr. Throndsen could testify to.

11 THE COURT: Is there any objection to the
12 Court receiving Exhibit Number 1?

13 MR. WILSON: May I have just a moment,
14 your Honor, to peruse through it?

15 THE COURT: All right.

16 MR. BOLEY: No objection, your Honor.

17 MR. WILSON: No objection.

18 THE COURT: Exhibit 1 is received.

19 (Exhibit-1 received.)

20

21 PROFFER RE: PAUL THRONDSO

22 MR. BLUMENTHAL:

23 Your Honor, Mr. Throndsen, if he took the
24 witness stand, would testify that the value of the
25 Sky Lodge, a combination of the fractional shares --

1 the remaining fractional shares -- and commercial
2 hotel, which was appraised under Exhibit 1 as \$20.6
3 million as of April 6th, that that appraised value
4 has not changed between then and today and that he
5 would have the same opinion of value of the assets
6 today.

7 He would further testify with respect to
8 page 5 of Exhibit 1 -- there's a grid cell, depending
9 upon how people refer to it, in the middle of the
10 page. I'll wait until his Honor gets there.

11 THE COURT: So we're counting both sides
12 of the pages as a page?

13 MR. BLUMENTHAL: Well, I'm looking at the
14 actual numbered page --

15 THE COURT: Okay.

16 MR. BLUMENTHAL: -- which --

17 THE COURT: All right. I have it.

18 MR. BLUMENTHAL: Okay. In that middle
19 cell where you -- it has "2010, 2011, 2012, 2013"
20 across the top, that's a summary of if the
21 residential fractional shares -- and there are 63
22 remaining that are owned by Easy Street Partners, the
23 debtor -- were sold while the Sky Lodge was
24 maintained as a going concern over a three-and-a-half
25 year period between confirmation and 2013, that

1 taking into account the carrying charges, the
2 commissions, which are set forth in the middle of
3 that cell, as well as the rental revenue that would
4 be realized by renting those units out, the -- Easy
5 Street Partners, or whomever is the successor owner,
6 actually keeps 50 percent of the revenues that are
7 rented out from the units that are already sold, but
8 they would receive the revenue of the remaining 63
9 units.

10 He's taken that into account and he would
11 testify and conclude that his opinion today is the
12 same that was given at the April 14th hearing that
13 the units, if sold in an orderly fashion, marketed in
14 a commercially reasonable manner over a period of
15 time, would realize on a net basis approximately \$19
16 million.

17 And if you look at the bottom line of
18 the 16 million, he backed out, to get a present-day
19 value of what someone would pay for that today and
20 investors, and set a profit. But the actual
21 realization from these units, taking into account the
22 cost, the holding time, as well as the revenues that
23 you would receive from the remaining units, would net
24 approximately \$19 million. He would so testify --

25 THE COURT: Right. So the way you reached

1 the \$19 million is the 16,168,000 that's net cash
2 flow --

3 MR. BLUMENTHAL: Yes.

4 THE COURT: -- and add to it the investor
5 incentive --

6 MR. BLUMENTHAL: Yes.

7 THE COURT: -- 3,558,000?

8 MR. BLUMENTHAL: Correct.

9 THE COURT: All right.

10 MR. BLUMENTHAL: So in excess of 19
11 million.

12 THE COURT: Okay.

13 MR. BLUMENTHAL: Now, he would then
14 testify -- and in the disclosure statement that was
15 approved by your Honor at page 51 of the disclosure
16 statement, if this case was converted to a Chapter 7
17 and the property was sold at an auction in -- over a
18 period of 60 days -- a quick auction of the
19 property -- that the liquidation value of the
20 debtor's assets would decrease between 25 and 35
21 percent. Therefore, the amount that would be
22 realized by a liquidation debt, not as a going
23 concern, would realize between 25 and 35 percent less
24 than the 20.6 million dollars. I haven't done the
25 math, but it's approximately 13 million dollars. He

1 would so testify to that today.

2 He would also testify that he's fully
3 aware of the various properties in the Park City area
4 that have been auctioned off and that the auction
5 values being realized are 40 percent off of their
6 going concern value.

7 He indicate -- would indicate and would so
8 testify that the Sky Lodge would be a better property
9 to auction off, and therefore, in his opinion, the
10 realization would be between 25 and 35 percent less.

11 And that, your Honor, would conclude his
12 testimony. I would request the Court to accept the
13 proffer as evidence.

14 THE COURT: Is there any objection to the
15 proffer?

16 MR. WILSON: No objection to the proffer
17 and no desire to cross-examine on the part of the
18 Wickline parties.

19 THE COURT: Mr. Boley, is there any
20 objection to the proffer?

21 MR. BOLEY: No objection to the proffer.
22 I would like to briefly cross-examine.

23 THE COURT: All right. Mr. Throndsen, if
24 you would come forward.

25 THE BAILIFF: Please step forward and

1 raise your right hand.

2

3

PAUL THRONDSSEN,

4

called as a witness, being duly sworn, was
5 examined and testified as follows:

6

THE BAILIFF: Please take the witness
7 stand, state and spell your name.

8

MR. THRONDSSEN: Paul W. Throndsen,
9 T-H-R-O-N-D-S-E-N.

10

11

CROSS-EXAMINATION

12

BY MR. BOLEY:

13

Q. Mr. Throndsen, Matt Boley appearing on
14 behalf of Park City I, LLC. Nice to see you here
15 today.

16

My question doesn't necessarily go to your
17 current appraisal. I thought it would be helpful for
18 myself and for the Court to understand how today's
19 values differ from those that may have existed at the
20 time that a default was declared in this case and
21 this case went into bankruptcy.

22

So I would like you to first ask -- let me
23 ask you this first: Have you previously attempted to
24 determine a value of this property back in the fall
25 of 2009?

1 MR. BLUMENTHAL: Objection, your Honor.
2 It's beyond the scope.

3 UNIDENTIFIED SPEAKER: Mr. Blumenthal, I
4 cannot hear you.

5 MR. BLUMENTHAL: I'm sorry. I'd rather --
6 okay. I could sit when I speak, but objection, it
7 goes beyond the scope of direct, your Honor, and I
8 don't believe he laid a proper foundation for that
9 question.

10 THE COURT: Both of the objections are
11 correct. It is beyond the scope of direct, and I
12 don't think there's been adequate foundation yet.
13 What is the testimony you expect to elicit,
14 Mr. Boley?

15 MR. BOLEY: Your Honor, I expect to elicit
16 some testimony that will be relevant to the Court's
17 consideration of WestLB's actions in this case, and
18 specifically the values at the time that a default
19 was declared and that this -- this was put in a
20 position where WestLB could acquire the assets --
21 were much different than today. And I think
22 Mr. Throndsen's qualified and --

23 THE COURT: Well, but -- okay. So the
24 problem that I would have with that is, I could take
25 judicial notice that market conditions change

1 constantly, but the purpose of having an appraiser is
2 being able to come up with at least an appraisal as
3 of an exact date.

4 So I think Mr. Throndsen could testify
5 and, in fact, he already has, what his original
6 appraisal was at that date and that the value of the
7 property has gone down since that date. And
8 Mr. Throndsen -- Mr. Throndsen could testify that as
9 of the date that this case was filed in September
10 that market conditions have changed, but I don't --
11 I'm pretty sure that Mr. Throndsen's going to say
12 that he doesn't know what the value of this property
13 was on that date.

14 So having -- going through all that
15 questioning, I'm not sure how it helps the Court.

16 MR. BOLEY: Your Honor, what I -- what I
17 hope to establish first is -- I haven't been able to
18 ask the predicate question. Maybe he's done an
19 analysis or done a valuation as of that date, I don't
20 know.

21 THE COURT: All right. Well, why don't
22 you lay some foundation then.

23 MR. BOLEY: And then, your Honor, the
24 follow-up, even if he has not, I believe that in
25 formulating his current opinions, he's probably

1 looked at not just market conditions have changed,
2 but he'll probably be able to give the Court some
3 idea of how they've changed and what ratios based on
4 his analysis of market conditions. So let me start
5 there.

6 Q. (By Mr. Boley) Have you examined
7 historical data, comparative market sales, going back
8 through the fall of 2009 in formulating this opinion
9 or in trying to evaluate the value of this property?

10 A. Well, the original appraisal was in
11 December of '09. Market data going back even up to
12 two years was used relative to market trends and
13 market data available. Because of the dearth of
14 sales, we typically don't go back that far, but we
15 did in this case because the market had very little
16 activity because of the current economic and
17 financial conditions. And so the December appraisal
18 represents a lot of that data through that period.

19 Q. So both the December appraisal and the
20 current appraisal both look at market conditions in
21 the Park City area going back two years?

22 A. No. The April appraisal only considered
23 market conditions that had changed between December
24 and April, which is the basic market for those type
25 of units during the ski season.

1 Q. And based on your prior analysis, did you
2 formulate an opinion about the value of this property
3 as of December 2009?

4 A. Yes, I did.

5 Q. And what is your opinion of the value as
6 of two thousand -- December 2009?

7 A. My opinion was 22 million dollars.

8 Q. And based on your analysis of the
9 comparable sales in the two years leading up to
10 December 2009, do you have an opinion, yes or no, as
11 to whether the December 2009 value was less than the
12 value had been six months previously?

13 A. I do not. Analysis to the data could be
14 applied, but most of the sales ended at the
15 April 2009 ski season. There was very little data
16 during the summer, and there was little -- very
17 little indication of how market trends were -- what
18 market trends were occurring at that time. So the
19 December appraisal took a look at all that
20 information up to that point.

21 Q. It sounds like you did carefully examine
22 comparable sales in April of 2009.

23 A. Correct.

24 Q. And how have -- how has the value of this
25 property changed since April of 2009?

1 A. I do not know. I did not perform an
2 appraisal as of April 2009.

3 Q. Is it -- is it true that real property
4 values have declined significantly since April
5 of 2009?

6 MR. BLUMENTHAL: Objection. Again, no
7 foundation and it goes beyond the scope of the
8 direct.

9 THE COURT: I -- I think that we are
10 talking about confirmation as of today's date. I
11 think he can answer that question. I'm going to
12 overrule the objection.

13 THE WITNESS: Could you repeat the
14 question, please?

15 Q. (By Mr. Boley) My question was whether
16 it's true that the value of this property has
17 declined significantly since April of 2009.

18 A. I do not know if it has or not.

19 Q. Is it true, based on your analysis of all
20 of what you deem to be comparative sales going back
21 two years from today and actually two days -- two
22 years from December of '09, that there has been a
23 decline -- a significant decline in values
24 generally --

25 MR. BLUMENTHAL: Objection. Asked and

1 answered.

2 Q. (By Mr. Boley) -- for this type of
3 property?

4 MR. BLUMENTHAL: I'm sorry. The witness
5 said he did not know.

6 THE COURT: Sustained.

7 Q. (By Mr. Boley) And you indicated that the
8 current appraisal takes into account changes in
9 market conditions between December and the present
10 and there is a corresponding change in value?

11 A. Yes.

12 Q. And what's the decline of value from
13 December through the present?

14 A. Well, it was 22 million and it had been
15 reduced to 20,600,000.

16 Q. Okay. And what are the market conditions
17 that have changed -- which have caused that change?

18 A. The beginning -- the beginning of the ski
19 season, December 2009 and in January/February 2010,
20 there started to be a shift in the market to some
21 auction sales. And so there were several prime
22 projects, particularly up in Empire Pass and at The
23 Canyons, who started some pricing mechanisms based
24 upon auctions and selling to the lowest bidder.

25 So there was a significant shift in how

1 properties were being marketed and how they were
2 being sold, which is reflected in the April 2010
3 value.

4 Q. So although you can't speak to changes
5 from a year ago until the present, it's -- it's your
6 opinion that, at a minimum, there's been a decline of
7 five to ten percent in the value since December?

8 A. Correct.

9 MR. BOLEY: Your Honor, that's all I have.

10 THE COURT: All right. Any --

11 MR. BLUMENTHAL: No redirect.

12 THE COURT: You may step down,

13 Mr. Throndsen.

14 THE WITNESS: May I be excused?

15 THE COURT: You may be excused.

16 MR. BLUMENTHAL: Your Honor, we indicated
17 that Duncan Robertson would also be a witness. He
18 filed a declaration. Being that we -- you indicated
19 you were going to break in about 20 minutes, we would
20 suggest that we take him out of order. Mr. Havel
21 will handle Mr. Robertson. We would request that the
22 Court accept his declaration as evidence and that if
23 anyone wishes to cross-examine him, they may.

24 MR. WILSON: Your Honor, may I just impose
25 an objection to proceeding by proffer? The

1 declaration was filed last night at whatever 20:41
2 was, quite late. And I believe under the
3 circumstances and because of the importance of his
4 testimony that -- and because I think we've probably
5 got a little time, I would propose that we simply
6 proceed in ordinary fashion for his testimony.

7 THE COURT: Well, Mr. Havel, would
8 Mr. Robertson's testimony on direct exceed the 11
9 paragraphs in the declaration?

10 MR. HAVEL: No, your Honor. Our intention
11 would be that he would testify to the substance of
12 the statements in the declaration, identify or
13 authenticate the exhibits that are therein, and then
14 we would open it up for cross-examination at that
15 point.

16 THE COURT: I guess my question is whether
17 it's going to be quicker to let Mr. Wilson and
18 Mr. Boley read the declaration and do their
19 cross-examination or whether we do it on --

20 MR. HAVEL: No. I don't believe that it
21 will be more efficient to ask them to do it
22 correctly.

23 THE COURT: All right.

24 MR. HAVEL: Obviously, whenever you're
25 doing a question and answer session things roam a bit

1 and people supplement, not intentionally. But we
2 would be comfortable submitting the written
3 declaration and on cross, if they have a little bit
4 more scope, we could be lenient on that. But the
5 purpose would be to expedite this.

6 And even though it came in last night, it
7 isn't that long. It's, you know, 11 paragraphs but
8 we basically have three pages and none of the subject
9 matter is very controversial in there.

10 THE COURT: All right. Well, I think it's
11 going to be quicker, Mr. Wilson, if I just take a
12 recess and you read through it and then you can start
13 conducting your cross-examination.

14 MR. WILSON: Well, you don't even have to
15 take a recess if you don't want to, your Honor. I'll
16 read it while we're all here in the courtroom. I
17 have very quickly perused it.

18 THE COURT: I mean, it seems to me that on
19 cross-examination all the relevant information is
20 going to be brought out that you might have
21 objections to. So I will receive the declaration of
22 Mr. Duncan (sic) as a proffer of his testimony and we
23 can have cross-examination.

24 MR. HAVEL: Your Honor, I assume that that
25 will allow us to admit -- I think it was identified

1 as tab number 6 of our exhibit package as the next
2 exhibit in order?

3 THE COURT: Yes. Exhibit 6 is received.

4 (Exhibit-6 received.)

5 MR. HAVEL: Thank you, your Honor.

6 THE COURT: Mr. Robertson, would you come
7 forward?

8 THE BAILIFF: Please step forward and
9 raise your right hand.

10
11 DUNCAN ROBERTSON,

12 called as a witness, being duly sworn, was
13 examined and testified as follows:

14 THE BAILIFF: Please take the witness
15 stand, state and spell your name.

16 MR. ROBERTSON: Duncan Robertson,
17 R-O-B-E-R-T-S-O-N.

18 THE COURT: Mr. Wilson?

19 MR. WILSON: I'm finding myself wishing
20 that I had opted for the recess, and it simply is
21 mostly because of the attachments that are there. Do
22 we still have the option of a recess, your Honor?

23 THE COURT: You do.

24 MR. WILSON: I was watching the clock and
25 I was understanding that the Court in 14 minutes is

1 going to go do something else, and I'm not sure how
2 to play that. If I take a -- if I take ten minutes
3 to look at it and formulate some cross-examination,
4 we're going to have about five minutes left for
5 that -- for that to go. So...

6 THE COURT: All right.

7 MR. WILSON: I'm not -- I'm not sure how
8 to --

9 THE COURT: All right. Is there anything
10 else we could address in 10 or 15 minutes,
11 Mr. Blumenthal or Mr. Cannon?

12 MR. BLUMENTHAL: Well, I could use 15
13 minutes to proffer Mr. Shoaf's testimony in 15
14 minutes if you would accept his proffer.

15 MR. WILSON: You know, have we got -- let
16 me -- there is -- there was another witness from one
17 of the creditors that was going to come up for a
18 minute or two, or is that off the table now?

19 THE COURT: No. Okay.

20 MR. BLUMENTHAL: Let me ask the -- I'm
21 sorry.

22 THE COURT: Maybe what I'll do is I'll
23 take a recess. We can have some discussion with
24 Mr. Havel and Mr. Jenkins. Mr. Wilson can formulate
25 his cross-examination. I mean, basically, the

1 purpose of Mr. Robertson's testimony, as I understand
2 it, is to establish the amount of the debt due to
3 WestLB. And so --

4 MR. WILSON: And I may not have any cross,
5 your Honor. I -- I hope nobody gets mad at me if I
6 don't after all this -- all this wrangling here.

7 THE COURT: Oh, I -- they may --

8 MR. WILSON: It's just inherent in the
9 nature --

10 THE COURT: You know, they might not get
11 mad, but --

12 MR. WILSON: Well, they'll say bad things.

13 THE COURT: The Court will take a recess
14 until 1:15.

15 MR. WILSON: Thank you.

16 THE COURT: Oh, let me -- before I recess,
17 is there going to be -- there's going to be
18 Mr. Shoaf's proffer. Perhaps we could discuss that
19 during the break to see whether there will be an
20 acceptance of the proffer or a requirement for direct
21 examination.

22 Court is in recess.

23 THE BAILIFF: All rise.

24 (Recess taken from 11:33 a.m. until
25 1:19 p.m.)

1 THE BAILIFF: All rise. Court resumes in
2 session. Please be seated.

3 THE COURT: When we took a recess we were
4 on Mr. Robertson's declaration. The Court had
5 accepted that into evidence as Exhibit Number 6.

6 Is there any desire to cross-examine,
7 Mr. Wilson?

8 MR. BOLEY: Your Honor, may I deal with
9 one housekeeping issue? Matthew Boley appearing on
10 behalf of Park City I, LLC, now joined by George B.
11 Hofmann. And Mr. Hofmann will be handling the
12 proceedings for the rest of the afternoon. I would
13 ask to leave, to be excused.

14 THE COURT: All right. You may be
15 excused, Mr. Boley.

16 Mr. Robertson?

17 THE CLERK: Please step forward and raise
18 your right hand.

19
20 DUNCAN ROBERTSON,

21 called as a witness, being duly sworn, was
22 examined and testified as follows:

23 THE CLERK: Please take the witness stand,
24 state and spell your name.

25 MR. ROBERTSON: Duncan Robertson,

1 R-O-B-E-R-T-S-O-N.

2 MR. WILSON: May I have one moment, your
3 Honor?

4
5 CROSS-EXAMINATION

6 BY MR. WILSON:

7 Q. Hi, Mr. Robertson. I see from your
8 declaration that you are an executive director of
9 WestLB, AG. What is an executive director?

10 A. It is a senior title within WestLB.

11 Q. And is it actually WestLB, comma, AG that
12 you are employed by?

13 A. Yes.

14 Q. So it's the -- it is the German bank
15 headquartered, I presume, in Germany, correct?

16 A. Correct. I'm actually employed by the New
17 York branch.

18 Q. All right. Is the New York branch a
19 separate entity from the German entity?

20 A. It is. It is a branch of the bank, so it
21 is not a separately --

22 THE BAILIFF: Mr. Robertson, can you pull
23 the microphone a little closer to you? Thank you.

24 Q. (By Mr. Wilson) And what is the New York
25 branch structure of WestLB? Can you give that to us

1 generally? I'm interested to know what the
2 management structure is in the New York branch and
3 then how you fit into it. Is that a question that
4 you can understand?

5 A. Yes.

6 Q. Would you --

7 A. I may -- I may ask for clarification, but
8 we have a branch manager.

9 Q. Thank you. And then beyond that?

10 A. And then there are various executives,
11 which -- some of which report to the branch manager,
12 others which report directly to Germany.

13 Q. Thank you. And where in that structure do
14 you as an executive director fit?

15 A. I report to the risk manager, who reports
16 to Germany -- to executives in Germany.

17 Q. Thank you. And have you been involved in
18 this Easy Street Partners loan for -- since inception
19 of the loan?

20 A. No.

21 Q. When did you become involved?

22 A. In late 2008.

23 Q. And what was the situation with the loan
24 when you became involved in late 2008?

25 A. If I may rephrase, or if I may come

1 back --

2 Q. You have permission. As the Court and
3 everybody in here knows, if I don't ask a good
4 question, I'm always happy to get a good answer.

5 THE COURT: The question was vague. You
6 can rephrase it.

7 THE WITNESS: The portfolio I took over in
8 December of 2008. The account itself I became more
9 familiar with in late 2009.

10 Q. (By Mr. Wilson) So as executive director,
11 do you have responsibility for a portfolio of loans?

12 A. Yes.

13 Q. And I'm assuming that from your
14 conversation and -- that this was one of the loans in
15 your portfolio.

16 A. Correct.

17 Q. All right. And when did this loan with
18 WestLB go into default, to the best of your
19 knowledge?

20 A. I believe it was late 2009.

21 Q. And what kind of a default was it that
22 occurred in late 2009?

23 A. There was a missed interest payment.

24 Q. Thank you. And is this loan generally
25 secured by a trust deed on the physical real estate?

1 A. We have a mortgage on the property.

2 Q. Thank you. And was that mortgage ever
3 placed into judicial or nonjudicial foreclosure
4 status?

5 MR. HAVEL: Your Honor, unless there's a
6 foundation that this is -- unless this is a
7 foundation for something in the declaration, it seems
8 to go far field.

9 We have identified the exhibit that we
10 filed at the beginning of this case, which was an
11 extensive declaration with all of our loan documents
12 and the history that was filed by Mr. Winicker (ph),
13 a different party, and we filed a proof of claim
14 that's of record. And so I'm wondering if this is
15 leading to a foundation for a question that relates
16 to this document or if we're just fishing around for
17 a while.

18 MR. WILSON: Your Honor, it's probably
19 beyond the scope of direct, and I'm happy to recall
20 this gentleman at a later time on things. And I'll
21 move into a few questions that are just very pointed,
22 directing -- directed to the declaration, if that's
23 the wish of the parties.

24 MR. HAVEL: That would be preferable.
25 Yes, please.

1 THE COURT: Let's do that.

2 MR. WILSON: Okay. Can do.

3 Q. (By Mr. Wilson) Would you -- do you have
4 your declaration before you?

5 A. Yes.

6 Q. Good. Would you look at paragraph seven
7 and read with me the first sentence: "The plan
8 proposed by Partners and WestLB substantially adopts
9 the plan previously proposed by Partners alone."

10 Is that your testimony?

11 A. Yes.

12 Q. Okay. How did the -- the previous plan
13 proposed by Partners alone treat the claims of
14 Management and Development? Do you know what I mean
15 by those two terms, Management and Development, the
16 two entities?

17 A. Yes.

18 Q. The question is, how did the previously --
19 the plan previously proposed by Partners treat the
20 approximate 1.6 million dollar claims of Management
21 and Development?

22 A. I would have --

23 MR. HAVEL: I object, your Honor. What is
24 in the plan is self-evident and his recollection at
25 this point is irrelevant.

1 MR. WILSON: I think a witness who makes a
2 declaration under penalty of perjury ought to know
3 what he's talking about, and it would be useful to
4 know what he thinks he is testifying to.

5 MR. HAVEL: Your Honor, I'm sure he can
6 discuss the similarities and differences, but to
7 identify specific line items or specific sections
8 seems to me a little bit problematic. That's our
9 objection.

10 MR. WILSON: One side makes 1.6 million
11 dollars, which is a very simple difference
12 probably --

13 THE COURT: Well, I think the question
14 wasn't a line-item question. It was how the
15 treatment of Management and Development -- and you
16 understand what Mr. Wilson meant by Management and
17 Development, how it differs under the two plans, so
18 he may answer that question.

19 THE WITNESS: I would need to have the
20 plan in front of me in order to refresh my memory on
21 that.

22 Q. (By Mr. Wilson) Okay. So the answer is
23 you don't really know as you sit there on the witness
24 stand today what the differences are; is that
25 correct?

1 A. Correct.

2 Q. Thank you. And so when you say, "The plan
3 proposed by Partners and WestLB substantially adopts
4 the plan previously proposed by Partners alone," you
5 don't know whether it's really substantially or not
6 substantially similar?

7 A. I know that they are substantially similar
8 in that --

9 Q. But you don't know exactly how they are
10 treated, specifically those two claims?

11 A. Not on a line-item basis without the
12 document in front of me.

13 Q. Thank you.

14 MR. WILSON: Okay. I have no further
15 questions, but subject to recall, please, so that I
16 may explore some other issues. Thank you.

17 MR. HAVEL: Your Honor, the recall issue
18 is related only to the fact that Mr. Robertson has a
19 flight out at five tonight to New York. So I'm not
20 sure where he fits in with Mr. Shoaf's presentation,
21 but I would hope we could accommodate that travel
22 schedule.

23 MR. WILSON: I hope we all can.

24 THE COURT: Well, let's see how the
25 hearing goes and I'll keep that in mind, Mr. Havel.

1 MR. HAVEL: Thank you, your Honor.

2 THE COURT: Thank you.

3 MR. HOFMANN: Your Honor, we would also
4 intend to recall Mr. Robertson, but in the interest
5 of accommodating the witness, I'd be happy to address
6 all my questions now if that's the preference of the
7 parties. Otherwise, I would ask that the Court
8 direct the witness to be available for recall in
9 later stages of the proceeding.

10 THE COURT: Well, I'll direct that he be
11 available today as long as we're in court.

12 MR. HOFMANN: Okay. Thank you, your
13 Honor.

14

15 CROSS-EXAMINATION

16 BY MR. HOFMANN:

17 Q. Mr. Robertson, I'd like to direct you to
18 your declaration. It is -- I believe it's under tab
19 six in the binder you have in front of you.

20 A. I have it.

21 Q. You have it there?

22 A. Yes.

23 Q. I'd like you to -- I'd like to ask you a
24 question concerning paragraph five of your
25 declaration, particularly the last sentence.

1 "WestLB's obligation to fund under the
2 plan is subject to approval of WestLB management in
3 Germany," true statement?

4 A. For paragraph five, yes.

5 Q. For any other purpose?

6 A. I think you will see in paragraph six
7 the -- since the -- the filing of the plan
8 supplement, WestLB has received comments on the term
9 sheet from WestLB and debtor. Attached hereto as
10 Exhibit 2 is the revised term sheet, which supersedes
11 in its entirety the term sheet. Attached hereto as
12 Exhibit 3 is the redline comparison. The revised
13 term sheet and note are no longer conditioned upon
14 approval of WestLB.

15 Q. I see. So if I turn to Exhibit 2, to your
16 declaration, that is the current term sheet on the
17 table, true?

18 A. Yes.

19 Q. So if I look at the first -- there's kind
20 of an area on the first page of Exhibit 2; it's a
21 block in bold print. Do you see where I'm referring
22 at the top of the page?

23 A. Yes.

24 Q. And it indicates that it's a proposal to
25 provide exit financing. Has the proposal been

1 approved by WestLB senior management? Is that what
2 I'm hearing you say?

3 A. Yes.

4 Q. So it's not contingent on any approval?

5 A. From Germany, correct.

6 Q. Is it contingent on any approval from the
7 New York office?

8 A. No.

9 Q. Is it contingent upon any due diligence?

10 A. I believe if -- further down you will see
11 there's conditions of closing. Those are the
12 conditions which bind us.

13 Q. So provided those conditions are
14 satisfied, WestLB is obligated to lend?

15 A. Up to the amounts reflected in our
16 documents, yes. And by the way, the -- yes.

17 Q. So one of those conditions is item four,
18 dismissal of the pending committee litigation with
19 prejudice. Do you see that item?

20 A. Yes.

21 Q. So WestLB's commitment to lend is
22 conditioned upon receiving a release of that
23 litigation?

24 A. Yes.

25 Q. If that litigation were not released,

1 would WestLB be willing to lend?

2 A. We would consider situations as they come
3 up, as part of any normal negotiation which goes on
4 within our institution.

5 Q. Is there any assurance that WestLB would
6 lend if that condition is not satisfied?

7 A. WestLB has a substantial exposure in this
8 transaction. We always weigh the pros and cons of
9 the decisions that we make. We would have to cross
10 that bridge when we came to it.

11 Q. So WestLB would consider funding even if
12 that release were not provided?

13 A. At this point in time, that -- I do not
14 have an approval to do that. I would not provide
15 that.

16 Q. You can't assure the Court that you would
17 fund if that release is not provided?

18 A. I do not have authorization to do this,
19 no.

20 Q. Going to the first page of Exhibit 2, to
21 your declaration, there's a description of the
22 facility and it's broken into two parts: A 6.2
23 million dollar senior loan piece and a second 10
24 million dollar junior loan piece. Do you see that?

25 A. Yes.

1 Q. Why is the loan broken into two parts?

2 A. It was the intention to provide the
3 greatest opportunity for this project to emerge from
4 the bankruptcy.

5 The intention here was to have a current
6 pay and a pick portion which would allow sufficient
7 cash to meet the company's obligations as they become
8 due and payable, part of which is the payments to the
9 unsecured holders, which we are proposing here to
10 make sure they get paid.

11 Q. So the second piece is riskier. Is that
12 fair to say?

13 A. Yes.

14 Q. And it is priced accordingly; would you
15 agree with that? There's a higher interest rate?

16 A. It bears a higher interest rate.

17 Q. But the payments are less certain to be
18 made?

19 A. It is further down in the capital
20 structure.

21 Q. Has there been any analysis done by WestLB
22 as to the likelihood of that second piece getting
23 paid?

24 A. Yes.

25 Q. Has that been provided to the Court

1 through your declaration or otherwise that you're
2 aware of?

3 A. WestLB always provides -- undertakes its
4 own assessments and analysis, as we do in any
5 transaction.

6 Q. But that hasn't been provided to the Court
7 or other parties to your knowledge?

8 A. Correct.

9 Q. Okay. Under paragraph eight of your
10 declaration, there's -- you reference a contribution
11 of 2.9 million dollars on the effective date and up
12 to 1.5 million dollars in capital -- working capital
13 as needed after that, true?

14 A. Yes.

15 Q. Where did those figures come from?

16 A. These figures have been in line and
17 consistent with what a number of other plan funders
18 have put forward and are in line with the obligations
19 to get this company a plan put forward.

20 Q. But you are aware, I take it, that other
21 plan funders had proposed to fund greater
22 contributions than WestLB is proposing now?

23 MR. BLUMENTHAL: Objection, your Honor.
24 That is an incorrect fact, for the record. No one
25 had proposed that. The only funding agreements filed

1 with the Court were for amounts lower than that.

2 MR. HOFMANN: Your Honor, I think the
3 witness can answer the question and counsel can
4 address it in argument.

5 THE COURT: Well --

6 MR. HAVEL: I'm sorry, was the -- the
7 question is whether he knew of any that were more
8 lucrative than this?

9 MR. HOFMANN: Well, let me -- let me
10 withdraw the question and rephrase it.

11 MR. HAVEL: That would be great. Thank
12 you.

13 Q. (By Mr. Hofmann) You're aware of other
14 plan funding proposals that have been made in
15 connection with this bankruptcy case, correct?

16 A. Yes.

17 Q. And are you aware of the amounts of the
18 other plan funding proposals in terms of working
19 capital that would be provided to the debtor?

20 A. Yes. Exact amounts, no. Approximate
21 amounts.

22 Q. And some of those amounts are greater than
23 what WestLB has proposed here, aren't they?

24 A. I don't recall the specifics.

25 Q. Mr. Robertson, I'd like to direct you to

1 paragraph ten of your declaration; if you would focus
2 on that paragraph. You reference there that, "This
3 loan has been allocated to a portfolio containing
4 distressed and other assets that are non-core to
5 WestLB's business." Do you see that sentence I'm
6 referring to?

7 A. Yes.

8 Q. Is that a result of a decision that was
9 made in Germany?

10 A. Yes.

11 Q. Does this relate to what's commonly
12 referred to as a "bad bank" formed in Germany?

13 A. Yes.

14 Q. And the bad bank took certain of WestLB's
15 loans and put it into that portfolio?

16 A. Yes.

17 Q. And this loan is among the loans that's
18 been allocated to that bad bank portfolio?

19 A. Yes.

20 Q. And you mentioned in the second sentence
21 of this paragraph ten, "Only limited capital is
22 available to deal with all the assets allocated to
23 that portfolio."

24 Where does that limited capital come from?
25 Is it WestLB or some other source?

1 A. That has come from another source.

2 Q. Do you know that other source?

3 A. Generally, yes.

4 Q. And what is it?

5 A. It is -- it is obligations of its owners.

6 Q. The owners of the bad bank or the owners
7 of WestLB? I'm just trying to understand.

8 A. The owners of WestLB.

9 Q. So the owners of WestLB created the bad
10 bank?

11 A. Correct.

12 Q. And they put certain loans within the
13 purview of the bad bank?

14 A. It should be noted that -- you keep
15 referring to it as a bad bank. I would like to
16 clarify that this is a portfolio of assets which are
17 non-core to WestLB's business going forward. That
18 does not necessarily mean that these are bad assets.

19 Q. So what's the distinction between a core
20 and a non-core asset?

21 A. Business lines which WestLB has determined
22 to pursue going forward.

23 Q. So WestLB has determined not to purs --
24 not to pursue this business line going forward?

25 A. Correct.

1 Q. When was the bad bank formed?

2 A. It was effective on January 1 of this
3 year.

4 Q. When was it determined that this loan --

5 THE COURT: Excuse me, Mr. Hofmann.

6 MR. HOFMANN: Yes, your Honor.

7 THE COURT: Maybe everybody else here
8 knows and I'm the only one, and I -- you keep
9 referring to a bad bank. I'm not sure I understand
10 the term or the meaning "bad bank."

11 Mr. Robertson, you seem to agree with
12 Mr. Hofmann when he said bad bank.

13 THE WITNESS: Well, I will only say that
14 because the German name, I cannot pronounce. It is
15 very long and literally translated, it means first
16 bad bank.

17 THE COURT: Okay. So that is the name of
18 the --

19 THE WITNESS: So --

20 THE COURT: -- bank where these assets --

21 THE WITNESS: On a very literal
22 translation, it is, yes.

23 THE COURT: Okay.

24 Q. (By Mr. Hofmann) Maybe you could -- for
25 the Court's benefit, what's the concept of a bad

1 bank? Do you know understand what the concept of a
2 bad bank is?

3 A. I mean, everybody's got -- I mean, I've
4 got my own interpretation, but that's --

5 Q. And what's your interpretation?

6 A. Typically these are assets which are --
7 are not core or potentially assets which are
8 impaired.

9 Q. And is it your testimony this is in the
10 non-core group, not the impaired group; is that
11 correct?

12 A. By virtue of them entering into
13 bankruptcy, I would consider them to be an impaired
14 asset.

15 Q. But it -- so it's both impaired and
16 non-core. Is that fair to say?

17 A. That is correct.

18 Q. And was the loan classified as a non-core
19 asset before it was classified as an impaired asset?

20 A. I don't recall the exact dates as to when
21 one might have crossed the other.

22 MR. HAVEL: Your Honor, may I object and
23 question the relevancy of -- the declaration does not
24 identify any of WestLB's decisions based on
25 characterizations of holdings or characterizations of

1 the questions we're going into now. There are issues
2 that could come up, but I'm not sure where this is
3 going.

4 MR. HOFMANN: It certainly refers to the
5 non-core -- I mean, WestLB filed this affidavit, your
6 Honor. I think we're entitled to know what non-core
7 assets are and what its limitations and requirements
8 are. This is how this debtor is proposing to exit
9 bankruptcy.

10 MR. HAVEL: I thought that had been asked
11 and answered. We were going much further afield, I
12 thought, your Honor. I reassert my objection based
13 on the relevancy and the scope of the declaration.

14 THE COURT: Well, Mr. Hofmann, I'm pretty
15 sure that we could spend a lot of time going through
16 the affidavit asking to expand every line of the
17 affidavit. I guess the question is what -- what is
18 the relevancy of the questioning?

19 MR. HOFMANN: The question is, is this
20 plan being proposed in good faith and is this plan
21 proponent acting in good faith.

22 MR. HAVEL: Then I guess I reaffirm my
23 relevancy question because I have no idea how an
24 internal classification of the note is going to
25 affect the question of good faith or bad faith

1 treatment here, your Honor.

2 MR. HOFMANN: It would be nice if we had
3 more than eight days to consider this plan, but
4 that's the amount of time we've had. I could have
5 taken a deposition of this witness, know what I'm
6 going to hear before I hear it, but that -- we've
7 been provided eight days.

8 THE COURT: Well, I'll allow the
9 questioning to continue for a while, but it would
10 seem that if what the -- we could get quickly to your
11 issue and how this classification relates to whether
12 the case has been filed -- or the plan has been filed
13 in good faith or not. So you may proceed.

14 MR. HOFMANN: Thank you. I'll do my best
15 not to ask the same questions again.

16 Q. (By Mr. Hofmann) So it's your testimony
17 that the bad bank came into existence on January 1st
18 of this year, correct?

19 A. Correct.

20 Q. Was this loan immediately moved into the
21 bad bank's portfolio or was there a lag in time?

22 A. The portfolio shift from WestLB to -- why
23 don't we refer to it as EAA, which is the short
24 acronym for the long German name that I still can't
25 pronounce -- was effective January 1, 2010.

1 Q. So this loan moved into the bad bank
2 effective immediately when the bad bank was formed?

3 A. Into EAA, yes.

4 Q. Okay. And EAA is the bad bank that we've
5 been referring to?

6 A. Yes.

7 Q. So was it moved -- on January 1st, was it
8 moved to the bad bank because it was non-core or
9 because it was impaired at that time?

10 A. It had been decided a period before as to
11 which assets were non-core to the bank and which
12 assets were core.

13 Q. And when was that determination made?

14 A. I can't recall the exact date.

15 Q. Was that determination made within the
16 year 2009?

17 A. No.

18 Q. Before 2009?

19 A. Yes.

20 Q. Was it made in 2008?

21 A. Yes.

22 Q. I believe you testified that you -- I
23 don't remember your exact relation to this credit,
24 but you became associated with this credit in
25 late 2008, true?

1 A. It was in the portfolio that I took over,
2 which was at the very end of 2008.

3 Q. Do you recall a month?

4 A. It was probably December of 2008.

5 Q. And was it at that same time that the loan
6 was determined to be a non-core asset?

7 A. It was determined to be non-core prior to
8 my taking the portfolio --

9 Q. I see.

10 A. -- over.

11 Q. I see. Do you know on what basis this was
12 determined to be a non-core asset?

13 A. It is a hospitality asset and the
14 hospitality sector was determined to be non-core to
15 the bank.

16 Q. And do you know who made that
17 determination of what was non-core and that
18 hospitality was non-core?

19 A. The senior executives at the bank.

20 Q. But what effect did that have within
21 WestLB when in late 2008 it was determined to be a
22 non-core asset?

23 A. Perhaps you can rephrase the question.

24 Q. Well, in late 2008 before your association
25 with this portfolio and this loan, it was determined

1 that hospitality credits were non-core assets of the
2 bank?

3 A. Correct.

4 Q. Did the bank want to exit that line of
5 business?

6 A. It was no longer core to the bank. So by
7 extension, yes.

8 Q. So the -- is it fair to say the bank would
9 do what it could to eliminate its exposure to these
10 credits, whether in the form of foreclosing its
11 interest, having some other bank take over the asset
12 and the credit, any means possible to exit exposure
13 to this non-core asset; is that fair?

14 A. No.

15 MR. BLUMENTHAL: Object to the form.

16 THE COURT: The question was answered and
17 the answer was no.

18 Q. (By Mr. Hofmann) So then what would --
19 how would you treat a non-core loan differently than
20 any other loan within the bank?

21 A. You wouldn't.

22 Q. Then what's the effect of the designation
23 as a non-core loan?

24 A. It happens to be a portfolio which
25 you're -- we're going to enter into no new assets in

1 that asset class, and assets which are on the book
2 will run off the book in due course.

3 Q. And there's a limited amount of capital
4 set aside to run them off the books; is that fair to
5 say?

6 A. The EAA was capitalized with a limited
7 capital base or a specific capital base.

8 Q. Are all of the loans that -- within your
9 portfolio non-core loans?

10 A. With the exception of a few, they're all
11 non-core.

12 Q. Explain to me how the limited
13 capitalization, as reflected in your testimony and
14 this declaration, affected the amount that WestLB was
15 willing to fund as part of this entity's emergence
16 from bankruptcy.

17 A. These numbers were calculated on a basis
18 which we felt were appropriate and necessary for us
19 to protect our asset.

20 Q. Taking into account the amount of capital
21 that's available to address the portfolio as a whole?

22 A. We had to seek approval in order to move
23 forward on that. Decisions are made on the basis of
24 adequate funding in order to be able to accommodate
25 such an approval.

1 MR. HOFMANN: Your Honor, subject to
2 recalling this witness, I have no further questions.

3 THE COURT: Any redirect?

4 MR. BLUMENTHAL: Your Honor, I -- I would
5 request that -- I mean, he said this was going to be
6 part of his recall. I would ask him to finish.

7 MR. HOFMANN: I think we were asked not to
8 finish just a moment ago, your Honor.

9 MR. WILSON: And from the Wickline
10 interest, that's the same dilemma we face is, I was
11 attempting to --

12 MR. HOFMANN: The same thing, yeah.

13 MR. WILSON: -- get out to some other
14 things and we were turned back. So if we're going to
15 do him all at once we should do him all at once.

16 MR. HAVEL: Your Honor, could I ask for a
17 moment to consult with the witness about (inaudible)?

18 THE COURT: Yes. Court will take a brief
19 recess and just the let the courtroom deputy know
20 when you're ready.

21 Court is in recess.

22 THE BAILIFF: All rise.

23 (Recess taken from 1:53 until 1:57 p.m.)

24 THE BAILIFF: All rise. Court resumes in
25 session. Please be seated.

1 THE COURT: So what is the decision? Are
2 we going to continue with the examination or --

3 MR. HAVEL: Your Honor, we, after
4 discussing it with Mr. Robertson and his schedule,
5 would like the parties to proceed with their
6 additional questioning at this point. We do -- I do
7 want to raise two prospective issues. I'll let the
8 questioning start, but I think we should be sensitive
9 to them. And they both relate to the status of Park
10 City and the line of questioning they've been
11 pursuing to date.

12 The first issue which I wish to reserve
13 for objection purposes is their standing to
14 participate in this at all. Admitted by the schedule
15 that was put out by Mr. Wilson, they're an equity
16 holder up at the holding company's level and they
17 have purported to argue that they had some interest
18 in what was going on down here and they've suggested
19 that maybe there was a lawsuit against WestLB that
20 would get them value. That is just not true. The
21 fact of the matter is the plan has no basis for
22 WestLB to have suits go against them. The debtor at
23 the cash collateral hearings released all of its
24 claims.

25 The committee litigation, which has been

1 discussed, is only a equitable subordination claim;
2 it's not an affirmative recovery lawsuit. And the
3 committee has already filed a stipulation which says
4 if they don't oppose the plan they will agree to
5 dismiss the lawsuit. So there is no basis in the
6 prior plans or in this plan for Park City to be
7 talking about lawsuits against WestLB for their
8 potential value.

9 With the reservation of rights on
10 relevancy and standing for those issues, I'd -- we'd
11 like the questioning to proceed.

12 THE COURT: All right. I'll let it
13 proceed a little further, but I'll be candid. I
14 don't understand the -- the relevancy. The -- I
15 understand that there's a loan that's been placed in
16 a portfolio and there's been some determination as to
17 the amount that WestLB is willing to put into the
18 plan. Is the suggestion that there's supposed to be
19 more in the plan and therefore it's in bad faith?
20 I --

21 MR. HOFMANN: Your Honor, that fact in
22 isolation -- and I -- may or may not be relevant,
23 what -- I think the greater relevancy is the claims
24 the estate through the committee at the present time
25 holds against WestLB. Until nine days ago, there was

1 a plan on file which proposed to prosecute those
2 claims, which could have resulted in value to my
3 client.

4 MR. BLUMENTHAL: Your Honor, that's
5 just --

6 MR. HOFMANN: Nine days ago a different
7 plan was filed, which eliminates -- if I could -- if
8 I could just speak without interruption, please. And
9 the relevancy goes to the -- two items: One is the
10 good faith of this plan proponent in the proposal of
11 this plan, and the second is the proposed release of
12 these claims through the plan. And I think the Court
13 should understand what is being released.

14 MR. BLUMENTHAL: If I may, your Honor.

15 Easy Street Partners under every plan that
16 was filed and the amendments starting in the, I
17 think, third week in January, never preserved claims
18 against WestLB. And as your Honor is aware, when the
19 cash collateral stipulation was approved at the
20 outset of this case, Easy Street Partners agreed that
21 it had no claims and waived -- and released any
22 claims against WestLB. So the Easy Street Partners
23 estate has no claims.

24 The lawsuit filed by the committee, as
25 Mr. Havel pointed out, was an equitable subordination

1 claim. I don't believe it requested affirmative
2 release and that has been resolved. The committee is
3 happy and satisfied with what they're getting. And,
4 therefore, there is absolutely no relevancy
5 whatsoever as to Easy Street Partners releasing
6 WestLB. That's been a fact in this case since the --
7 probably the first month of this case. Therefore, we
8 think the whole line of questioning is just out of
9 sorts.

10 Moreover, the only evidence before your
11 Honor is that there is no equity in this debtor that
12 would float up to the equity security holders if the
13 claims were allowed in full. And it's just off mark
14 and off center, your Honor. I think it's just a
15 waste of everyone's time.

16 MR. HAVEL: And, your Honor, I had made an
17 earlier reference to a stipulation with the
18 committee, and I think just for the purposes of
19 assisting counsel who may not have been aware of the
20 record, on February 9, 2010 before any plan was filed
21 by the debtor, in the committee's own adversary
22 proceeding, we stipulated with the committee to the
23 following: "In the event that the plan is not
24 opposed by the committee and is confirmed by
25 partners, the committee shall, upon the plan becoming

1 effective, dismiss the Complaint, the adversary
2 proceeding with prejudice."

3 So we have had an absolute clear
4 understanding with the unsecured creditors and with
5 the committee since the commencement of their
6 litigation that this action was going to go away and
7 that has been a matter of public record. And for
8 Park City I to now characterize themselves as being
9 the beneficiaries of an action that no one else has
10 even thought had any significant role in this case is
11 just misleading the Court and misstating what they
12 should know from the record.

13 MR. HOFMANN: Then perhaps there's no need
14 for the committee's release as part of this plan.

15 THE COURT: Well, Mr. Hofmann, how does
16 your client benefit -- how would your client benefit
17 from the litigation that the committee has brought?

18 MR. HOFMANN: If WestLB's claim were
19 subordinated, then there's a chance of recovery for
20 those downstream, such as my client.

21 THE COURT: Well, not subordinated to
22 unsecured creditors. Wouldn't they have to be
23 unsubordinated to equity?

24 Mr. Jenkins, perhaps you could help us out
25 here since you filed the Complaint, right?

1 MR. JENKINS: Your Honor, since we did
2 file the Complaint, my understanding -- and, as I
3 said, we did file it -- was that the effect of the
4 lawsuit was really a reordering of priorities. We
5 alleged that WestLB had engaged in certain conduct
6 which we felt should result in WestLB having its
7 claims at least subordinated to unsecured creditors,
8 and that was our prayer for relief was the
9 subordination to unsecured creditors.

10 And as Mr. Havel pointed out, we did early
11 on enter into a stipulation which provided that if a
12 plan was confirmed in the case which the committee
13 had not opposed, that upon that plan becoming
14 effective the litigation would be dismissed with
15 prejudice. And the intent, of course, was the
16 committee had filed this lawsuit and was hoping to
17 get a better treatment under any potential plan that
18 it might otherwise have gotten. And that treatment,
19 in fact, has been arrived at through a consensual
20 process.

21 Your Honor, that was the effect of the
22 lawsuit, as the one who filed it. Thank you.

23 MR. HOFMANN: The only thing I would add,
24 your Honor, is that this -- this secured creditor is
25 requiring a release as a condition of lending.